

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY DIVISION**

Talbot 2002 Underwriting Capital Ltd, White  
Mountains Re Sirius Capital Ltd, and Markel  
Capital Limited,

Plaintiffs,

v.

Old White Charities, Inc.,

Defendants.

Old White Charities, Inc.,

Third Party Plaintiff,

v.

HCC Specialty Underwriters, Inc., All Risks,  
Ltd., and Underwriters at Lloyd's London.

Third Party Defendants.

Bankers Insurance LLC,

Cross Claim Plaintiff,

v.

HCC Specialty Underwriters, Inc. and All  
Risks, Ltd.,

Cross Claim Defendants.

Case No.: 5:15-cv-12542

**PLAINTIFFS AND THIRD PARTY DEFENDANTS HCC AND UNDERWRITERS'  
MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Talbot 2002 Underwriting Capital Ltd, White Mountains Re Sirius Capital Ltd, and Markel Capital Limited (collectively, "Plaintiffs"), by and through counsel, submit this Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56, and move the

Court for summary judgment in their favor as to the issue of coverage for the claims asserted against Defendant Old White Charities Inc. (“Old White”). Joining in this Motion are Third Party Defendants HCC Specialty Underwriters, Inc. (“HCC”) and Certain Underwriters at Lloyd’s, London subscribing to Prize Indemnity insurance certificate numbers L009216, L009217, and L009218 (“Underwriters”), who along with Plaintiffs, also move the Court for summary judgment in their favor as to all claims pending against them set forth in Old White’s Counterclaim and Third Party Complaint.

Plaintiffs are entitled to summary judgment as a matter of law for the following reasons. First, no genuine issue of material fact exists regarding the lack of coverage under the Policy, as the insured, Old White, indisputably failed to comply with the Policy’s minimum yardage requirement.

In addition, Old White’s Counterclaim against Plaintiffs and Third Party Complaint against HCC and Underwriters, both alleging breach of contract, negligence, bad faith (common law and statutory),<sup>1</sup> and fraud, must fail. The breach of contract claim against Plaintiffs, Underwriters, and HCC must be dismissed because no coverage exists under the Policy. The contract claim against HCC specifically must be dismissed because HCC was not a party to the underlying contract, and, therefore, cannot be held liable on the contract. The common law bad faith claim against Underwriters fails because there can be no bad faith in the absence of coverage and because Old White has presented no evidence of bad faith. The statutory bad faith claim against Underwriters fails because Old White failed to provide evidence of a general business practice of Underwriters of “committing unfair claim settlement practice,” as required by West Virginia’s Unfair Trade Practices Act. With regard to the negligence claim, no liability exists because Old White has presented no evidence of any of the essential elements of the cause

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<sup>1</sup> The Court previously dismissed the common law and statutory bad faith claims against HCC.

of action. Similarly, as to the fraud claims, Old White's claims fail because Old White has presented no evidence of any type of misrepresentation made on behalf of Underwriters or HCC. The negligence and fraud claims also fail as to HCC because West Virginia law bars agent liability for tort claims. All of the claims fail to the extent Old White seeks to impose liability based upon conduct of All Risks because All Risks was not an agent of Underwriters or HCC. Thus, Plaintiffs, HCC, and Underwriters are entitled to summary judgment in their favor as to all remaining claims.

Plaintiffs, HCC, and Underwriters rely on and incorporate by reference the Exhibits attached herein, as well as the Memorandum of Law in support as further support for its Motion. The Exhibits include the following:

- Exhibit A: The Policy
- Exhibit B: Affidavit of Robin Lang
- Exhibit C: Excerpts from Deposition Transcript of Monte Ortel
- Exhibit D: Excerpts from Deposition Transcript of James Justice
- Exhibit E: Excerpts from Deposition Transcript of Jim Sweetwood
- Exhibit F: Excerpts from Deposition Transcript of Eugene "Gene" Hayes
- Exhibit G: Excerpts from Deposition Transcript of Mike Connatser
- Exhibit H: Excerpts from Deposition Transcript of Robin Lang
- Exhibit I: Excerpts from Deposition Transcript of Charles Henthorn
- Exhibit J: Excerpts from Deposition Transcript of James Mahurin
- Exhibit K: Excerpts from Deposition Transcript of P. Marshall Fleming ("M. Fleming")
- Exhibit L: Excerpts from Deposition Transcript of Gary Dickens
- Exhibit M: Excerpts from Deposition Transcript of Crystal Kelly
- Exhibit N: Excerpts from Deposition Transcript of Terry Miller

- Exhibit O: Excerpts from Deposition Transcript of Paul Fleming (“P. Fleming”)
- Exhibit P: Excerpts from Deposition of Bob Hamman
- Exhibit Q: Excerpts from Deposition of Arthur Bates
- Exhibit R: Excerpts from Deposition of Kenneth Tackett
- Exhibit S: Excerpts from Deposition of Hugh Mooney
- Exhibit T: Excerpts from Deposition of Kevin Workman
- Exhibit U: Excerpts from Deposition Transcript of James “Rudy” Martin
- Exhibit V: 5/16/2016 Email from Rusty Stehl at National Indemnity Company to Colin Wills at Bloss & Dillard

For the foregoing reasons, Plaintiffs respectfully request that this Court enter summary judgment in their favor, granting judgment in their favor as to all of the claims Plaintiffs have asserted against Old White and dismissing all claims Old White has asserted against Plaintiffs, HCC, and Underwriters.

Respectfully submitted this 15th day of September, 2016.

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**CERTIFICATE OF SERVICE**

I certify that on September 15, 2016, I electronically filed *Plaintiffs and Third Party Defendants HCC and Underwriters' Motion for Summary Judgment* by using the CM/ECF system which will send notification of such filing to the participants listed below:

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